IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1679 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

B S DYE CHEM INDUSTRIES ANKLESHWAR

Versus

GUJARAT STATE FINANCIAL CORPORATION - AHMEDABAD

Appearance:

MR BHUPENDRABHAI S.PATEL Party-In-Person for Petitioner

MR RD DAVE for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 25/04/2000

ORAL JUDGEMENT

This is a revision petition filed by the petitioner (original-plaintiff) in Civil Suit No.144 of 1991 challenging the judgment and order dated 27th July, 1999, recorded by the learned Civil Judge(J.D.), Ankleshwar, in Civil Misc. Application No.10 of 1998, under which the learned trial Judge dismissed the said application of the present petitioner filed under Section 5 of the Limitation Act for condonation of delay caused in filing application for restoration of suit dismissed for default.

2. The petitioner filed the aforesaid civil suit being Civil Suit No.144 of 1991 before the Civil Court at Ankleshwar. It appears that the said suit was dismissed

for default on 1st August, 1997. The petitioner came to know about the said dismissal on 13th August, 1998, through the bench clerk of the said court. Thereafter he filed aforesaid application on 7.9.98 for restoration of the said suit stating that he had no knowledge about the fact that the matter has been dismissed for default. According to the petitioner, before the trial court there was a delay in filing the aforesaid application. The petitioner therefore submitted application under Sec.5 of the Limitation Act, for condonation of delay caused in filing the said application.

3. After hearing the parties, the trial court found that the petitioner had not been successful in satisfying the court that there was a good and sufficient reason for filing restoration application late, therefore the trial court dismissed the said application of the petitioner under Sec.5 of the Limitation Act. Consequently the appeal could not be registered.

4. Feeling aggrieved by the order dtd.27.7.99 passed by the Learned Civil Judge(J.D.) at Ankleshwar below Ex.1, in Civil Misc.Appln.No.10 of 1998, the petitioner has preferred this revision application before this Court.

5. It has been contended here that the judgment and order passed by the trial court are not in accordance with law and have been passed without considering the settled position of law. That the trial court has failed to exercise the jurisdiction vested in him. That the trial court has committed serious jurisdictional error in passing the impugned judgment and order and the same is illegal, errorneous, arbitrary and against the evidence on record. That the trial court has not properly appreciated the facts and circumstances narrated by the petitioner in the petition. The petitioner therefore contended that on the whole the judgment and order of the trial court are illegal, errorneous and deserve to be set aside. The petitioner therefore prays that the present application be allowed and the aforesaid order of the trial court be set aside and delay caused in filing the application for restoration of the suit be allowed in terms of the relief prayed in the said application.

6. I have heard learned advocates for the parties and have perused the papers. An objection was raised on behalf of the respondent that the petitioner should have to filed appropriate appeal before the District Court under Order 43 of the Civil Procedure Code (for short `the CPC'), and therefore, the revision does not lie.

7. On this preliminary aspect of the case, the petitioner arguing the matter in person argues that, the petitioner had, in fact, filed the aforesaid application before the court concerned under the provisions of Section 151 of the CPC, and it was not an application under Order 9 of the CPC. Now if we turn the copy of the application submitted alongwith application under Sec.5 of the Limitation Act, we can find it at Annexure `B' in the present proceedings. The application has been initiated as application to restore on Civil Suit No.144/91 being dismissed for default on 1.8.97 as per Order 9 Rule 9 of the CPC. Even, it is an admitted position that the petitioner showed the said application as one under Order 9 Rule 9 of the CPC. Here, it has been argued that, since the petitioner was not informed about the date of hearing, and since the matter has been dismissed for want of knowledge or notice, the dismissal could not be treated as one under the provisions contained in Order 9 of the CPC. Therefore, restoration should be treated to be an application under Sec.151 of the CPC. If we go through the provisions contained in the CPC, it is very clear that, so far Order 9 is concerned, it does not say that where a suit has been dismissed for default of the plaintiff the restoration would never fall or would not fall under the provisions of Order 9, so as to enable the otherside to file restoration application under Sec.151 of the CPC. The petitioner, even if not informed by the court about the date fixed for hearing of the suit, and evenif the suit is dismissed for default then also the restoration application is required to be made under the same provisions of law, and there is no different provisions for restoration of suit.

8. The petitioner in person has referred to certain decisions of the Hon'ble High Court of Bombay and Hyderabad stating that such application would lie under 151 of the CPC and not under Order 9 Rule 9 of the CPC. It is not possible, with respect to the Hon'ble Judges of the Court concerned, to agree with the said proposition of law since the provision made under Order 9 is very clear and states that when the suit is dismissed for default then a restoration can be filed under Order 9 Rule 9 of the CPC, and it does not say if the party knows about the date of hearing, restoration would be under one provision and in other events restoration would be under a different provisions of law. Therefore it is not possible to agree with the said interpretation of the CPC.

9. Then a decision has been relied upon. It has been reported in 81 CWN 115. There it has been observed by the Hon'ble Bench of that court that the application under Sec.5 if rejected, the order rejecting the application cannot be a decree and the order rejecting the memo application is a merely an incidental order. There is no serious dispute about the same when the aforesaid application has been rejected then it may not amount to a decree but it may amount to an order. Then the orders are also appealable under Order 43 of the CPC. Therefore, I am of the view that the aforesaid matter was required to be preferred before the District Court and not before the High Court. The petitioner was required to prefer the appeal before the District Court and if the petitioner was late in preferring appeal, he could submit an application under section 5 of the Limitation Act, and could satisfy the District Court that there was a reason or good reason for approaching the court late, the court would entertain the said application and dispose of the same on merits of the said matter.

10. The facts of the aforesaid case go to say that the proposed appeal to the first appellate court namely the court of the District Judge was barred by law of limitation and application was made under sec.5 of the Limitation Act for condonation of delay and the memo of appeal was sought to be filed alongwith the application. The application under Sec.5 of the Limitation Act, was rejected with the memo of appeal. The question arose was whether the order rejecting the condonation application as well as rejecting the appeal under sec.5 of the Limitation Act was a decree. This is not a question before us. Here an admitted position that the order passed is an order and not a decree therefore the aforesaid decision will not apply to the facts of the case before us.

11. The petitioner himself argues that, in one matter though the different provision of law was indicated the court considered the matter in a proper perspective and referred the correct provision of law. His argument is that though the application was submitted under Order 9 Rule 9 of the CPC, this Court should treat the said application under Sec.151 of the CPC. As said above, the CPC is very clear and it laid down that when the suit is dismissed for default then the restoration is permissible under Order 9 Rule 9 of the CPC. It does not say that if the suit is dismissed for default and if the plaintiff is without notice or knowledge then the restoration would be under Sec.151 of the CPC.

12. Any way, I am of the view that, the present petitioner ought to have filed appeal under Order 43 of the CPC and if he was late in so doing, then he should have to filed appropriate application under Sec.5 of the Limitation Act before the District Court. When the appeal is provided, then it is very clear that revision would not lie. This is what we can gather from the provision contained in sub.sec.(2) of sec.151 that the High Court shall not entertain any revision against decree or order. Therefore in the present case, the facts show that the matter in question is appealable under Order 43 of the CPC and consequently the High Court cannot entertain the revision application. Even during the course of the argument, learned advocate for the respondent has suggested that, the petitioner still can go to the district court and may apply for condonation of delay stating that the petitioner was contesting the litigation before a wrong court and therefore the time consumed in the present revision application may also be taken into consideration in view of the provisions of the Limitation Act. It would be open to the petitioner to act accordingly or otherwise.

13. In view of the facts and circumstances of the case, I am of the view that the order in question can be challenged in appeal under Order 43 of the CPC, and when appeal is provided, the revision would not lie. The result is that the revision application is not competent and is accordingly dismissed. Rule accordingly stands discharged. However, considering the facts and circumstances of the case, there shall be no order as to costs.

(D.P. Buch, J.)

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